Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JANET LIERENZ, *Petitioner*

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,

Respondents

On Petition for Writ of Certiorari to the
Sixth District Court of Appeals of Ohio

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

J. MICHAEL GOLDBERG
Counsel of Record

75 Public Square
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Counsel for Petitioner

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Cleveland, Ohio 44114
Co-counsel for Petitioner

67 pp

APPENDIX

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IN THE COURT OF APPEALS OF ERIE COUNTY

Court of Appeals No. E-92-71
Trial Court No. 88-CV-129

Janet Lierenz, Executrix
Appellee/Cross-Appellants

v.

Max bowen, et al.
Appellant/Cross-Appellee

DECISION AND JUDGMENT ENTRY

Decided: January 14, 1994

* * * * *

Peggy Goldner and J. Michael Goldberg, for appellee/cross-appellants.

John Kirwan, for appellant/cross-appellee.

* * * * *

ABOOD, P.J. This is an accelerated appeal and cross-appeal from a judgment of the Erie County court of Common Pleas which denied appellants' motion to dismiss and appellee's motion for pre-judgment interest. Appellants/cross-appellees Max Bowen, et al. (appellants) set forth the following assignment of error:

"THE TRIAL COURT ERRED IN OVERULING (sic) DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AFTER PLAINTIFF WAS DISCHARGED IN HER REPRESENTATIVE CAPACITY AS EXECUTRIX OF THE ESTATE OF THE DECEASED."

Appellee/cross-appellant Janet Lierenz, Executrix of the Estate of Karl R. Lierenz, Sr., (appellee) sets forth the following assignment of error:

"PLAINTIFF/CROSS-APPELLANT IS ENTITLED TO PREJUDGMENT INTEREST ON THE JURY'S AWARD OF TWENTY SIX THOUSAND FIVE HUNDRED DOLLARS ON THE PARTIES' VERBAL CONTRACT, THE EXISTENCE OF WHICH WAS STIPULATED BY COUNSEL AT TRIAL AND WHOSE TERMS CLEARLY AND UNAMBIGUOUSLY STATED THAT 50 PERCENT OF THE CONTRACT AMOUNT IS DUE AND PAYABLE UPON DELIVERY OF MATERIALS, REMAINDER WAS DUE UPON COMPLETION OF THE PROJECT, WHERE: PLAINTIFF'S DECEDENT SUBSTANTIALLY AND IN GOOD FAITH COMPLETED HIS PART OF THE BARGAIN; THE AMOUNT OF MONEY DUE AND OWING WAS CLEARLY AND UNAMBIGUOUSLY STATED IN THE CONTRACT AND THESE AMOUNTS WERE -- AND TODAY REMAIN -- CAPABLE OF ASCERTAINMENT BY MERE

COMPUTATION OR ARE SUBJECT TO REASONABLY CERTAIN CALCULATIONS."

The facts that are relevant to the issues raised on appeal are as follows. On April 5, 1988, appellee, in her capacity as executrix of the estate of Karl Lierenz, filed suit against appellants, dba Crown Motel, following a contract dispute which arose after appellee's husband worked on an addition to the motel. Appellants counterclaimed and on May 9, 1989, appellee filed a motion to dismiss appellants' counterclaim. On November 22, 1989, appellants filed a motion for summary judgment. On February 26, 1990, the trial court granted both motions and dismissed the action.

On March 27, 1990, appellee filed a notice of appeal from the court's judgment of dismissal. While the appeal was pending, appellee filed a final accounting in the probate court and the probate court filed an entry which approved and settled the account of decedent karl Lierenz and discharged appellee as executrix of the estate.

In March 1991, this court reversed in part the trial court's ruling on the parties' motions. On remand, the trial court reinstated appellee's complaint and on January 15, 1992, appellants filed another motion to dismiss appellee's complaint on the ground that appellee lacked authority to maintain new litigation after having been discharged as executrix of the estate by the Probate Court. ON March 13, 1992, the trial court denied the motion.

On July 6, 1992, the matter proceeded to trial on the merits which resulted in a jury verdict in favor of appellee in the amount of $26,500. On October 8, 1992, upon appellee's motion to re-open the estate, the probate court vacated its prior order discharging her as executrix retroactive to the date of her original appointment on November 24, 1986. On October 26, 1992, the trial court denied appellee's motion for pre-judgment interest on the underlying contract and appellee filed a timely notice of appeal. On November 12, 1992, the trial court entered judgment for appellee in the amount of $26,500 and appellants filed a timely appeal.

In their sole assignment of error, appellants assert that the trial court erred in overruling their motion to dismiss appellee's complaint. Appellants argue that appellee had no right to continue to represent the estate after the probate court discharged her in 1990 and that it was error for the trial court to reinstate her complaint in march 1991. Appellee responds that the October 8, 1992 order of the probate court gave her the authority to maintain her suit against appellants.

R.C. 2109.35(A) - (D) provides that "the order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment" and sets forth only four exceptions under which such an order may be vacated. Those exceptions provide in part:

"A. *** for fraud ***;

"B *** for good cause shown, other than fraud, upon motion of any person affected by the order

who was not a party to the proceeding in which the order was made *** and who had no knowledge of the proceeding in time to appear in it;

"C. *** for good cause shown, other than fraud, upon motion of any person affected by the order who was a party to the proceeding in which the order was made solely by reason of his having been served by publication ***;

"D. *** for good cause shown upon motion of the fiduciary, if the motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust ***."

Upon consideration of the foregoing, this court finds that 1) where the final accounting in a decedent's estate has been filed and approved, the order of settlement has the effect of a judgment and can be vacated only in the manner set forth in R.C. 2109.35. In Re Reitler (1956), 73 Ohio Law Abs. 328, 137 N.E.2d 791; 2) the probate court's order approving and settling the account of Karl Lierenz in March 1990 had the effect of a final judgment and, thereafter, Janet Lierenz was no longer the executrix of the estate and died not have the authority to maintain an action on behalf of the estate; and 3) the March 13, 1992 denial of appellant's motion to dismiss was contrary to law and error and appellants' sole assignment of error is found well-taken.

Having found appellants' assignment of error well-taken, we find appellee's cross-assignment of error

appealing the denial of her motion for pre-judgment interest moot and not well-taken.

On consideration whereof, this court finds that substantial justice was not done the party complaining and the judgment of the Erie County Court of Common Pleas is reversed. Costs of this appeal are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/80.

/s/ Peter M. Handwork, J.

/s/ Charles D. Abood, P.J.
CONCUR

Melvin L. Resnick, J., dissents.

DISSENTING OPINION

RESNICK, M.L., J. I respectfully dissent. The majority decision focuses on the alleged reappointment of appellee as the personal representative of the estate of Karl Lierenz and the effect of R.C. 2109.35. The majority suggests that approval of the final account and the discharge of appellee precludes the prosecution of the claim against appellants.

First, there is no evidence in the record of this case to support the conclusion that appellee was ever reappointed as executrix of the Lierenz estate. Consequently, this argument should be disregarded. More importantly, settlement and distribution orders rendered by the probate court do not bar the contract claim. In approving a final account, the probate court determines only the correctness of the account. In Re Butler's Estate (1940), 137 Ohio St. 115, 117. Persons with whom the personal representative has dealings during the administration of the estate are not parties to the accounting proceeding. Id. Accordingly, settlement of an account and the discharge of a personal representative does not bar the subsequent prosecution of a chose in action which was an asset of a decedent's estate and which does not involve the issue determined by the probate court. That is, the doctrine of res judicata does not preclude an action by the legatee after distribution. See Whitehead v. Gen'l Tel. Co. (1969), 20 Ohio St. 2d 108.

The motion to dismiss filed by appellants was based, in essence, on Civ.R. 17(A) in that appellants asserted that the action against them was not being prosecuted by the real party in interest. In such instances, immediate dismissal is not the preferred remedy. Rather, a reasonable time for ratification, joinder or substitution of the real party in interest must be allowed. Civ.R. 17(A). Civ.R. 1(B) provides that the civil rules "shall be construed to and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." In this case, lengthy proceedings, including two appeals and a jury trial have

already occurred. Thus, while the trial court did err in permitting this cause of action to go forward in the name of the executrix, I believe that this cause should be reversed and remanded for further proceedings pursuant to Civ.R. 17(A).

IN THE COURT OF APPEALS
SIXTH JUDICIAL DISTRICT OF OHIO
ERIE COUNTY

Case No. E-92-71

JANET LIERENZ, EXECUTRIX,
APPELLANT

vs.

MAX BOWEN, ET AL.,
APPELLEE

NOTICE OF APPEAL TO THE
OHIO SUPREME COURT

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Peggy E. Goldner
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Attorneys for Appellant

John F. Kirwan
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(419) 626-1917

Attorney for Appellee

APPENDIX B-1

IN THE SIXTH DISTRICT COURT APPEALS
ERIE COUNTY, OHIO

JANET LIERENZ, EXECUTRIX	)	Ct. App. No. E-92-71
APPELLANT,	)	
vs.	)	NOTICE OF APPEAL TO THE OHIO SUPREME COURT
MAX BOWEN, ET AL.,	)	
APPELLEE.	)	

Notice is hereby given that the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through counsel, hereby appeals to the Ohio Supreme Court from the final judgment entered in this action by the Court of Appeals, Sixth Appellate District, on the 14th day of January, 1994. The case involves a substantial constitutional question.

Respectfully submitted,

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/s/ J. Michael Goldberg
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Cleveland, Ohio 44113
(216) 621-1375

Attorneys for Janet Lierenz, APPELLANT

APPENDIX B-2

CERTIFICATE OF SERVICE

A copy of the foregoing *Notice* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this _____ day of February, 1994.

/s/ J. Michael Goldberg

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix,	}	
	}	On Appeal from the
Appellant,	}	Erie County Court of
	}	Appeals, Sixth
vs.	}	Appellate District
	}	
	}	
MAX BOWEN, *et al.*,	}	Court of Appeals
	}	Case No. E-92-71
Appellees.	}	

MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

J. Michael Goldberg
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Attorney for Appellee

MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court grant Appellant an extension of forty-five (45) days within which to file her *Memorandum In Support of Supreme Court Jurisdiction.* Said *Memorandum* currently is due on 7 March 1994. The grounds for this Motion are more fully stated in the Affidavit attached hereto and incorporated herein by reference.

Respectfully submitted,

Peggy E. Goldner (0042299)
The Leader Building
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J. Michael Goldberg (0046685)
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Attorneys for Janet Lierenz, APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 4th day of March, 1994.

J. Michael Goldberg
Peggy E. Goldner

APPENDIX C-2

STATE OF OHIO }
COUNTY OF CUYAHOGA } SS.

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix, Appellant,	}	On Appeal from the Erie County Court of Appeals, Sixth Appellate District
vs.	}	
MAX BOWEN, *et al.*, Appellees.	}	Court of Appeals Case No. E-92-71

AFFIDAVIT OF J. MICHAEL GOLDBERG

Affiant, J. MICHAEL GOLDBERG, being first duly sworn according to law, deposes and says:

1. Affiant is a licensed attorney duly admitted to the practice of law in Ohio.

2. Affiant represents the Appellant, Janet Lierenz, whose *Memorandum In Support of Supreme Court Jurisdiction* is due for filing on 7 March 1994, pursuant to S. Ct. Prac. R. II, Section 5.

3. Affiant has substantially completed the research necessary to prepare said *Memorandum*; however, because of his unusually heavy trial and deposition schedule during the months of February and

March, Affiant has been unable to complete said *Memorandum* in time for filing on March 7th.

4. On 7 February 1994, Affiant caused the *Notice of Appeal to the Ohio Supreme Court* to be filed in the Sixth District Court of Appeals at Erie County. From Wednesday 9 February through Monday 14 February 1994, Affiant was engaged in trial in the case styled Apel, *et al.* v. Katz, *et al.*, Cuyahoga County Common Pleas Case No. 174255, before the Honorable Timothy J. McGinty. Subsequently, Affiant was involved in full day depositions on the following dates: Thursday 17 February and Friday 18 February (Chandler, *et al.* v. Society Corporation, *et al*, United States District Court Case No. 1:93 CV 2352); Friday 25 February (Telephone Communications, Inc. v. David R. Gordon, *et al.*, Cuyahoga County Common Pleas Case No. 251439); and Thursday 3 March (Bybee v. Lorain Correctional Institution, *et al.*, United States District Court Case No. 1:93 CV 1768).

5. Within the next two (2) weeks, Affiant must prepare and file at an Appellate Brief in the Eighth District Court of Appeals (Jennings v. Ameritrust Company, *et al.*) and two (2) post-trial motions regarding Apel v. Katz, *supra.*

6. Within the next three (3) weeks, Affiant must prepare for and take at least seven (7) depositions in the Chandler case, *supra*, as well as prepare for trial, which currently is scheduled for 11 April 1994.

7. Affiant therefore requests that this Honorable Court grant him forty-five (45) days from 7

March 1994 within which to prepare and file the *Memorandum In Support of Supreme Court Jurisdiction* on behalf of the Appellant.

8. Affiant respectfully asserts that good cause exists for the granting of this Motion, and that such is not interposed for the purpose of delay.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ J. Michael Goldberg

SWORN TO BEFORE ME, and subscribed in my presence on this 4th day of March, 1994.

/s/
Gary A. Kazdin-Attorney
My commission does not expire.

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix, Appellant,	}	On Appeal from the Erie County Court of Appeals, Sixth Appellate District
vs.	}	
MAX BOWEN, *et al.*, Appellees.	}	Court of Appeals Case No. E-92-71

SECOND MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

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Attorneys for Appellant

JOHN F. KIRWAN
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(419) 626-1917

Attorney for Appellee

MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court grant Appellant an extension of fourteen (14) days within which to file her *Memorandum In Support of Supreme Court Jurisdiction.* Said *Memorandum* currently is due on 15 April 1994. The grounds for this Motion are more fully stated in the Affidavit attached hereto and incorporated herein by reference.

Respectfully submitted,

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458 Leader Building
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Cleveland, Ohio 44113
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Attorneys for Janet Lierenz, APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 15th day of April 1994.

J. Michael Goldberg
Peggy E. Goldner

STATE OF OHIO }
COUNTY OF CUYAHOGA } SS.

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix, Appellant,	}	On Appeal from the Erie County Court of Appeals, Sixth Appellate District
vs.	}	
MAX BOWEN, *et al.*, Appellees.	}	Court of Appeals Case No. E-92-71

AFFIDAVIT OF J. MICHAEL GOLDBERG

Affiant, J. MICHAEL GOLDBERG, being first duly sworn according to law, deposes and says:

1. Affiant is a licensed attorney duly admitted to the practice of law in Ohio.

2. Affiant represents the Appellant, Janet Lierenz, whose *Memorandum In Support of Supreme Court Jurisdiction* is due for filing on 15 April 1994, pursuant to S. Ct. Prac. R. II, Section 5.

3. Affiant has substantially completed the research necessary to prepare said *Memorandum*; however, Affiant has been unable to complete said *Memorandum* in time for filing on April 15th.

4. Affiant expects to be in Louisville, Kentucky from Tuesday April 19th through Saturday April 23rd and will not be able to complete the *Memorandum* during this time.

5. Affiant requests that this Honorable Court grant Appellant a second extension of fourteen (14) days, or until 29 April 1994, to file the *Memorandum In Support of Supreme Court Jurisdiction* on behalf of the Appellant.

6. Affiant respectfully asserts that good cause exists for the granting of this Motion, and that such is not interposed for the purpose of delay.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ J. Michael Goldberg

SWORN TO BEFORE ME, and subscribed in my presence on this 15th day of April 1994.

/s/
Gary A. Kazdin-Attorney
My commission does not expire.

THE SUPREME COURT OF OHIO

Janet Lierenz, Executrix, Appellant,	}	1994 TERM
	}	To wit: April 18, 1994
v.	}	
	}	Case No. 94-0510
Max Bowen, et al., Appellees.	}	E N T R Y

On written request of appellant for an extension of time to file a memorandum in support of jurisdiction, it is ordered by the Court that, good cause not having been given for an extension, the request is denied.

/s/ THOMAS J. MOYER, C.J.

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix, Appellant,	}	On Appeal from the Erie County Court of Appeals, Sixth Appellate District
vs.	}	
MAX BOWEN, *et al.*, Appellees.	}	Court of Appeals Case No. E-92-71

MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION INSTANTER

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Attorney for Appellee

MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION INSTANTER

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court grant Appellant leave to file her *Memorandum In Support of Supreme Court Jurisdiction* instanter. The grounds for this Motion are more fully stated in the Affidavit attached hereto and incorporated herein by reference.

Respectfully submitted,

Peggy E. Goldner (0042299)
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Attorneys for Janet Lierenz, APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 15th day of April 1994.

J. Michael Goldberg
Peggy E. Goldner

STATE OF OHIO }
COUNTY OF CUYAHOGA } SS.

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix, Appellant,	}	On Appeal from the Erie County Court of Appeals, Sixth Appellate District
vs.	}	
MAX BOWEN, *et al.*, Appellees.	}	Court of Appeals Case No. E-92-71

AFFIDAVIT OF J. MICHAEL GOLDBERG

Affiant, J. MICHAEL GOLDBERG, being first duly sworn according to law, deposes and says:

1. Affiant is a licensed attorney duly admitted to the practice of law in Ohio.

2. Affiant represents the Appellant, Janet Lierenz, whose *Memorandum In Support of Supreme Court Jurisdiction* was due for filing on 15 April 1994, pursuant to S. Ct. Prac. R. II, Section 5.

3. On April 15th, Affiant filed a motion requesting a fourteen (14) day extension to file said *Memorandum*, indicating in the supporting Affidavit that he would be out of the State during the week of April 18th.

4. In the motion for extension, Affiant neglected to inform this Court that he was in Columbus

from Tuesday April 12th through Thursday April 14 and was therefore unable to complete the *Memorandum.*

5. Affiant was in Louisville, Kentucky from Tuesday April 19th through Saturday April 23rd.

6. On April 22nd, Affiant called his office from Louisville and was informed that the motion for extension had been denied.

7. Affiant returned to Cleveland on Sunday April 24th and rearranged his Monday schedule in order to complete and forward the *Memorandum* for filing on Tuesday April 26th.

8. Affiant respectfully requests this Honorable Court grant Appellant leave to file the *Memorandum In Support of Supreme Court Jurisdiction* instanter.

9. Affiant respectfully asserts that good cause exists for the granting of this Motion, and that Appellee will not be prejudiced by the granting of same.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ J. Michael Goldberg

SWORN TO BEFORE ME, and subscribed in my presence on this 25th day of April 1994.

/s/
Gary A. Kazdin-Attorney
My commission does not expire.

APPENDIX F-4

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix,	}	
	}	On Appeal from the
Appellant,	}	Erie County Court of
	}	Appeals, Sixth
vs.	}	Appellate District
	}	
	}	
MAX BOWEN, *et al.*,	}	Court of Appeals
	}	Case No. E-92-71
Appellees.	}	

MEMORANDUM IN SUPPORT OF SUPREME COURT JURISDICTION

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Attorney for Appellee

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PROPOSITION OF LAW NO. 1:

A COURT OF APPEALS DEPRIVES A PARTY OF HER RIGHT TO DUE PROCESS UNDER THE DUE PROCESS CLAUSE OF U.S. CONST. AMEND. XIV, SECTION 1, AND THE DUE COURSE OF LAW PROVISION OF O. CONST. ART. I, SECTION 16, WHEN IT ORDERS THE DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION BECAUSE OF A TECHNICAL DEFECT IN THE COMPLAINT, WHERE THE NON-APPEALING PARTY WAS UNDER NO DUTY TO CURE THE DEFECT AT THE TRIAL COURT LEVEL. 4

A. A COURT OF APPEALS MAY NOT ORDER DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION FOR FAILURE TO PROSECUTE THE ACTION IN THE NAME OF THE REAL PARTY IN INTEREST, WHERE SUCH PARTY WAS NOT GIVEN A REASONABLE OPPORTUNITY TO SUBSTITUTE THE

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UNDER R.C. § 2309.59, A COURT OF APPEALS SHALL DISREGARD ANY PLEADING ERROR OR DEFECT WHICH DOES NOT AFFECT THE SUBSTANTIAL RIGHTS OF THE ADVERSE PARTY. NO FINAL JUDGMENT OR DECREE SHALL BE REVERSED OR AFFECTED BY REASON OF SUCH ERROR OR DEFECT10

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A COURT OF APPEALS DEPRIVES THE NON-APPEALING PARTY OF HER RIGHT TO TRIAL BY JURY WHEN IT REVERSES JUDGMENT ON THE JURY'S VERDICT AND ORDERS THE DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION BECAUSE OF A PURELY TECHNICAL PLEADING DEFECT. O. CONST. ART. I, § 5. 14

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PROPOSITION OF LAW NO. 4:

WHERE THE AMOUNT OWING UNDER A CONTRACT IS CAPABLE OF ASCERTAINMENT BY MERE COMPUTATION OR IS SUBJECT TO REASONABLY CERTAIN CALCULATIONS, INTEREST RUNS ON THE DEBT FROM THE TIME IT WAS DUE, EVEN THOUGH LIABILITY FOR THE DEBT IS DISPUTED. R.C. § 1343.03(A) 15

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STATEMENT OF THE CASE

On April 5, 1988, Plaintiff/Appellant, Janet Lierenz, in her capacity as Executrix of the estate of Karl Lierenz, filed a complaint against the Defendants/Appellees. On May 9, 1989, Appellant filed a motion to dismiss Appellees' counterclaim. On November 22, 1989, Appellees filed their motion for summary judgment. On February 26, 1990, the lower court granted both motions and dismissed the action.

On March 27, 1990, Appellant filed her timely notice of appeal. Appellees filed no notice of appeal.

While the said appeal was pending, Appellant filed what purported to be a final account in Probate Court, Huron County. Upon said filing, the Probate Court filed an Entry Approving and Settling The Account relating to the estate of Karl Lierenz.

One year later, on March 22, 1991, the court of appeals reversed **in part** the trial court's ruling on the parties' respective motions. The appellate court reinstated Appellant's complaint. The Court did *not* revive the counterclaim because Appellees had not appealed its dismissal.

On January 15, 1992, Appellees filed another motion to dismiss the complaint on the ground that Appellant lacked authority to maintain new litigation. The lower court properly denied said motion.

On July 6, 1992, the matter proceeded to trial on the merits. Although the Appellees' counterclaim had

not been reinstated, the counterclaim was tried as well. Appellant prevailed on both the complaint and counterclaim, and judgment was subsequently entered on the verdict.

On October 8, 1992, upon application to reopen estate, the Probate Court of Huron County vacated its prior order discharging Janet Lierenz of her trust as Executrix of the estate of Karl Lierenz. Said judgment provided that her appointment as the fiduciary of Karl Lierenz's estate is effective retroactive to the date of her original appointment of November 24, 1986; further, said appointment shall continue thereafter until discharged by further order of the probate court.

Subsequent to this judgment, Appellees filed their notice of appeal, assigning as the sole error the lower court's denial of their motion to dismiss the complaint because of Appellant's supposed lack of authority to maintain the within litigation. Of course, by the time the notice of appeal was filed, the issue was already moot.

Appellant also filed a notice of cross-appeal, assigning as error the trial court's denial of her motion for prejudgment interest on the underlying contract.

STATEMENT OF THE FACTS (REGARDING PREJUDGMENT INT

Appellant, Janet Lierenz, is and was the Executrix of the estate of her husband, Karl R. Lierenz. Mr. Lierenz, hereinafter referred to as Plaintiff's Decedent, had been engaged in the building construction industry.

On or about July 27, 1985, Mr. Lierenz entered into a contract with Max Bowen, Regan Lutzko, and Robert Hill, partners doing business as "Crown Motel." According to the parties' agreement, Mr. Lierenz would build an addition onto the Crown Motel restaurant, and the Defendants (Appellees) would pay Mr. Lierenz, d/b/a South Side Construction, the sum of $27,000.00 payable as follows: 50 percent of said sum upon delivery of materials; remainder upon completion of the project.

According to the testimony and evidence presented at trial, materials for the Crown Motel project were delivered as early as August 8, 1985. On November 6, 1985, Mr. Lierenz began actual construction of the Crown Motel addition.

At the insistence of the Appellees, Mr. Lierenz completed construction of the addition in December 1985 – in time for the Defendants to book various Christmas parties. In constructing this addition, Mr. Lierenz incurred out-of-pocket expenses of $22,844.11. The total amount of these expenses, which were incurred in materials and labor for the Crown Motel project, were paid in full by Mr. Lierenz. Defendants **never** reimbursed Mr. Lierenz for these expenses.

ARGUMENT

PROPOSITION OF LAW NO. 1:

A COURT OF APPEALS DEPRIVES A PARTY OF HER RIGHT TO DUE PROCESS UNDER THE DUE PROCESS

CLAUSE OF U.S. CONST. AMEND. XIV, SECTION 1, AND THE DUE COURSE OF LAW PROVISION OF O. CONST. ART. I, SECTION 16, WHEN IT ORDERS THE DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION BECAUSE OF A TECHNICAL DEFECT IN THE COMPLAINT, WHERE THE NON-APPEALING PARTY WAS UNDER NO DUTY TO CURE THE DEFECT AT THE TRIAL COURT LEVEL.

The Sixth District Court of Appeals reversed the trial court's judgment on the verdict, finding that Janet Lierenz, Plaintiff-Appellant herein, did not have authority to maintain the instant action as the representative of her deceased husband's estate. [Opinion, p. 5] The appellate court's decision apparently rests upon an implicit finding that Appellant was not a "real party in interest."

The appellate court's decision is an aberration; it purports to determine whether Janet Lierenz had authority to maintain the litigation in the instant civil action (maintained in Erie County C.P.) by analyzing and reviewing the proceedings *in the Huron County Probate Court*! The Sixth District completely disregards Appellant's substantive rights and effectively invades the Appellant's right to trial by jury.

A. A COURT OF APPEALS MAY NOT ORDER DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION FOR FAILURE TO

PROSECUTE THE ACTION IN THE NAME OF THE REAL PARTY IN INTEREST, WHERE SUCH PARTY WAS NOT GIVEN A REASONABLE OPPORTUNITY TO SUBSTITUTE THE REAL PARTY IN INTEREST. CIV. R. 17(A).

The Sixth District Court of Appeals held that the trial court should have dismissed Appellant's claim because she was not the real party in interest. This holding clearly is erroneous. Civ. R. 17(A) specifically provides, in relevant part;

> * * * ***No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.*** Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. (emphasis added)

The Staff Note to Civ. R. 17(A) provides, in relevant part:

> The fourth sentence of Rule 17(A) is borrowed directly from a 1966 amendment of Federal Rule 17(a). ***Assume that an administrator under a void appointment sues in good faith. Under Rule 17(A) the action is not dismissed; instead a reasonable time is permitted until***

> ***the proper administrator can be substituted in order that justice might be done.*** The 1966 amendment of Federal rule 17(a) "codifies" the principle enunciated in *Levinson v. Deupree*, 345 U.S. 648 (1953) and *Link Aviation, Inc. v. downs*, 325 F.2d 613 (D.D.C. 1963). * * * Rule 17(A) simply states clearly that a proper real party in interest may be substituted without the actions being dismissed. (emphasis added)

In the case at bar, both the trial court and the Appellant believed that the Janet Lierenz was the duly appointed executrix of the estate of her husband, Karl Lierenz. Had the trial court found that Mrs. Lierenz were acting under a void appointment, then presumably it would have given her a reasonable opportunity to substitute the name of the real party in interest, as required by Civ. R. 17(A). However, the trial court found Appellee's motion to dismiss not well-taken and denied same[1].

---

[1] The trial court's ruling on Appellee's motion to dismiss was proper. A "real party in interest" is one who has a real interest in the subject matter of the litigation and who would be entitled to damages. Wests Clermont Educ. Assoc. v. Bd. of Educ. (1980), 67 Ohio App. 2d 160

Appellant, Janet Lierenz, was both the executrix of her husband's estate *and* the sole legatee under her husband's will. Either way, Janet Lierenz would have been entitled to maintain her deceased husband's chose in action.

The Court of Appeals held that Appellee's motion to dismiss should have been granted at the trial court level. This holding clearly was wrong in view of the requirements of Civ. R. 17(A). Moreover, the Court of Appeals' action denied Mrs. Lierenz, the non-moving party, a reasonable opportunity to cure the pleading defect. Mrs. Lierenz received her first and *only* notice, that the real party in interest must be substituted, when the Court of Appeals issued its opinion.

Reasonable notice and hearing are the cornerstones of due process. The Fourteenth Amendment of the United States Constitution provides: "* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, Section 1. Similarly, Article I, Section 16 of the Ohio Constitution provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

O. Const. Art. I, Section 16 [Redress in Courts].

The action taken by the Court of Appeals denies Mrs. Lierenz *any* opportunity to cure a technical defect in pleading -- an opportunity she would have had available at the trial court level. Moreover, the appellate court's action effectively makes pleading a game of skill "in which one misstep by counsel may be decisive to the outcome." Hardesty v. Cabotage (*Per*

curiam 1982), 1 Ohio St. 3d 114, 117 ("Decisions on the merits should not be avoided on the basis of mere technicalities; pleading is not 'a game of skill in which one misstep by counsel may be decisive to the outcome. . . .")

In Vance v. Davis (1923), 107 Ohio St. 577, the Court held that the parties to a cause are determined from the entire record, not solely by the caption in the particular cause. *Id.*, ¶1, Syllabus by the Court. The Court stated:

> It would be trifling with law and justice to hold that the title of a cause determined its character or nature, or alone determined who were the parties to the cause. The record of the court's proceedings determines who the parties rightfully and legally are, and not the caption on the pleadings.

Id. at 580.

In the case at bar, the pleading defect found by the appellate court is as tenuous as a defect found in a caption. While the court makes much of the fact that Janet Lierenz was acting under a void appointment of executorship, the court completely ignores the fact that, whether the action is maintained in the name of the estate representative or her name individually, *in either event*, Janet Lierenz -- and no one else -- is the *sole* beneficiary. This information may be found in the trial court record in documents *submitted by Appellees.*

Civ. R. 1(B) states: "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." This Court has held several times, that:

> The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies. Civ. R. 1(B) requires that the Civil Rules shall be applied "to effect just results." Pleadings are simply an end to that objective.

Peterson v. Teodosio (1973), 34 Ohio St. 2d 161, 175. "Justice abhors the loss of causes of action by pure technicalities." Bell v. Coen (1975), 48 Ohio App. 2d 325, 327. If the appellate court's decision is allowed to stand, then Janet Lierenz will have lost her substantive cause of action by virtue of a curable pleading technicality which she had no opportunity to cure.

B. NO PERSON SHOULD BE DENIED THE ASSERTION OF A CAUSE OF ACTION ON CAPTIOUS OR PURELY TECHNICAL GROUNDS. R.C. § 1.11

The court's action violates spirit and intent of the Civil Rules and the rule of construction in R.C. § 1.11, which provides:

> Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.

The law is well settled: "All statutes relating to procedure are remedial in their nature and should be liberally construed and applied to effect their respective purposes." The Wellston Iron furnace Co. v. Rinehart, Admr. (1923), 108 Ohio St. 117, ¶1, Syllabus by the Court. Recognizing that strict rules of pleading may be used to impose unnecessary burdens on rights of recovery, this Court has further held that "no person should be denied the assertion of a cause of action on captious or purely technical grounds." Porter v. Fenner (1966), 5 Ohio St. 2d 233, ¶1, Syllabus by the Court.

In the case at bar, the appellate court has misapplied a rule of pleading (Civ. R. 17(A)), effectively destroying Janet Lierenz' substantive right to redress. Moreover, the appellate court completely disregarded the mandate of R.C. § 2309.59.

PROPOSITION OF LAW NO. 2:

UNDER R.C. § 2309.59, A COURT OF APPEALS SHALL DISREGARD ANY PLEADING ERROR OR DEFECT WHICH DOES NOT AFFECT THE SUBSTANTIAL RIGHTS OF THE ADVERSE PARTY. NO FINAL JUDGMENT OR DECREE SHALL BE REVERSED OR AFFECTED BY REASON OF SUCH ERROR OR DEFECT.

R.C. § 2309.59 provides, in relevant part:

In every stage of an action, the court shall disregard any error or defect in the pleadings or proceedings which does not affect the substantial

rights of the adverse party. No final judgment or rights or decree shall be reversed or affected by reason of such error or defect.

Nowhere -- neither at the trial court nor appellate court levels -- did Appellees even *claim* prejudice, much less demonstrate it. At no time ever did Appellees even *mention* that the alleged defect in pleading affected any substantial right. The appellate court failed in every respect to do substantial justice in this case.

The Ohio Supreme Court has previously addressed the situation where an action has been dismissed on the merits for a pleading deficiency. In Taylor v. Scott (1959), 168 Ohio St. 391, ¶2, Syllabus the Court held:

> Where a minor commences an action under Section 3111.01, Revised Code, and no attack is made upon her capacity to sue until after a verdict is rendered finding the defendant guilty, ***the trial court has the power under Section 2309.58, Revised Code, to permit the minor to amend her complaint to show her minority by adding the affidavit of her mother, as next friend, to the complaint and to conform the complaint and proceedings to the facts proved when the amendment does not substantially change the claim, and the failure to do so constitutes error.***) (emphasis added)

In the case at bar, the claimed error was one of form rather than substance. Whether Appellant

proceeded personally or in her capacity as executrix in no way altered the nature of the claim against the Appellees.

Ironically, the Sixth District Court of Appeals recognized the distinction between defects in form and defects in substance. In King v. New York, Chicago & St. Louis Rd. Co. (Lucas Co. 1966), 6 Ohio App. 2d 123, the court was faced with the issue of whether an amendment related back to the time of the filing of the original complaint. The court found that "* * * the change was in form rather than in substance. * * * It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit." *Id.* at 132. The court found further that "[T]he basis of this lawsuit, its essential facts, and its final object remain the same throughout all these proceedings." *Id.* at 131.

The appellate court failed to follow the clear and unambiguous mandate of R.C. § 2309.59. R.C. § 2309.59 defines both the appellate court's and this Court's duty:

> * * * If the reviewing court determines and certifies that, in its opinion, substantial justice has not been done to the party complaining as shown by the record, such court shall reverse the final judgment or decree and render, or remand the case to the lower court with instructions to render, the final judgment or decree that should have been rendered.

Id. Accordingly, this Honorable Court should reverse the appellate court's decision.

PROPOSITION OF LAW NO. 3:

A COURT OF APPEALS DEPRIVES THE NON-APPEALING PARTY OF HER RIGHT TO TRIAL BY JURY WHEN IT REVERSES JUDGMENT ON THE JURY'S VERDICT AND ORDERS THE DISMISSAL OF THE NON-APPEALING PARTY'S CAUSE OF ACTION BECAUSE OF A PURELY TECHNICAL PLEADING DEFECT. O. CONST. ART. I, § 5.

The within case was tried before a jury which rendered a unanimous verdict in favor of Appellant. The trial court entered judgment on the verdict, and Appellees appealed, claiming essentially that Janet Lierenz was not the real party in interest. The appellate court sustained Appellee's assignment of error and reversed, holding that the original complaint should have been dismissed.

In Gibbs v. Girard (1913), 88 Ohio St. 34, the Court held:

> The right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree.

Id., ¶2, Syllabus by the Court. The law is well-settled that granting a directed verdict violates a party's right

of trial by jury when there exists some evidence tending to prove material facts. A party's right of trial by jury is no less violated when a court -- especially a court of appeals -- reverses a judgment on a jury's verdict because of a curable technical pleading defect.

PROPOSITION OF LAW NO. 4:

WHERE THE AMOUNT OWING UNDER A CONTRACT IS CAPABLE OF ASCERTAINMENT BY MERE COMPUTATION OR IS SUBJECT TO REASONABLY CERTAIN CALCULATIONS, INTEREST RUNS ON THE DEBT FROM THE TIME IT WAS DUE, EVEN THOUGH LIABILITY FOR THE DEBT IS DISPUTED. R.C. § 1343.03(A)

Appellant filed the instant contract case and tried it to a jury. At trial, the jury found that Plaintiff's Decedent had substantially performed the contract between the parties. The price term to which the parties had agreed was Twenty-Seven Thousand Dollars ($27,000.00). The jury found in favor of the Plaintiff for Twenty-Six Thousand Five Hundred Dollars ($26,500.00).

Appellant filed a timely motion for prejudgment interest which was denied by the trial court. On cross-appeal, Appellant assigned as error the trial court's denial of prejudgment interest. However, the Court of Appeals refused to review this assigned error, indicating that it was moot based on the court's decision regarding the Appellee's assigned error.

This case fits squarely within the parameters of R.C. § 1343.03(A) which provides, in relevant part:

> [W]hen money becomes due and payable . . . upon all verbal contracts entered into . . . the creditor is ***entitled to*** interest at the rate of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. (emphasis added)

R.C. § 1343(A).

The law in Ohio is well-settled:

> **Where the amount owing under a contract is clear, interest runs on the debt from the time it was due, even though liability for the debt is disputed.**

Cleveland Neighborhood Health Serv., Inc. v. St. Clair Builders, Inc. (1989), 64 Ohio App. 3d 639; Tony Zumbo & Son Construction Co. v. Department of Transportation (1984), 22 Ohio App. 3d 141; Nursing Staff of Cincinnati, Inc. v. Sherman (1984), 13 Ohio App. 3d 328 ("A mere denial that one is liable for a debt that is otherwise clear and ascertainable is not sufficient to defeat a claim for prejudgment interest"). A party's entitlement to prejudgment interest turns upon a determination as to whether the underlying debt is liquidated. *Id.* "The assertion of a counterclaim does

not render a liquidated claim based on a contract unliquidated." L.A. Gross & Sons, Inc. v. Parisi (1990), 66 Ohio App. 3d 697.

"Furthermore, where money becomes due on a contract, interest accrues from the time the money should have been paid." [Citation omitted]. Allied Erecting & Dismantling Co. v. Auto Baling Co. (1990), 69 Ohio App. 3d 502, 506-507; *accord*, Braverman v. Spriggs (1980), 68 Ohio App. 2d 58. The Allied court stated:

> **"[P]rejudgment interest will not be denied where the money due is clearly based on contracts entered into by the parties.** [Citation omitted]. Neither will prejudgment interest be denied where the amount is capable of ascertainment by mere computation, or is subject to reasonably certain calculations."

Id. at 507; *accord*, Shaker Savings Assoc. v. Greenwood Village, Inc. (1982), 7 Ohio App. 3d 141.

In the case at bar, the parties entered into a contract. The terms of this contract were integrated and memorialized in Plaintiff's trial Exhibits A and B. At trial, counsel for the respective parties stipulated on the record that these two exhibits constituted the terms of the parties' agreement. Exhibit B provided; in relevant part:

> We hereby propose to furnish labor, materials, and equipment necessary in accordance to copy of original quotation attached to this

> contract for $27,000. Payments to be made as follows: 50 percent payment to be made when materials are delivered. Balance upon completion of job.

Clearly from the language contained in Plaintiffs Exhibit B, the contract between the parties was supported by valuable consideration. Exhibit B clearly and unambiguously states the price term as well as the mode of payment.

At trial, one of the Appellees, Regan Lutzko, admitted, and the jury found, that Plaintiff's Decedent had substantially performed his part of the bargain. Substantial completion of a contract entitles the contractor to the contract price agreed upon. Cleveland Health Serv. v. St. Clair Builders (1989), 64 Ohio App. 3d 639. In Cleveland Health Serv., the court held:

> Where the party obligated to perform under the contract makes an honest effort to do so, and there is no willful omission on its part, substantial performance is all that is required to entitle the party to payment under contract.

Id. at. 644.

In the case at bar, Defendant, Regan Lutzko, himself admitted that ***"The addition was done in December [1985]. . . ."*** (Record, page 83 line 18; page 74 line 17). Mr. Lutzko, testified on cross-examination:

Q Okay. And -- pardon me. Given the fact that the concrete slabbing had been placed and the footers and new walls and the roof, a substantial amount of work had been performed on this building then, correct?

A Yes.

Q Okay. He had substantially performed construction of this addition?

A Yes.

(Record, page 75 line 4)

Moreover, Mr. Lutzko, admitted on the record that Plaintiff's Decedent had performed "in good faith":

Q So you are saying that the delay caused in starting this project was your fault?

A The delay in starting it?

Q Yeah, because you didn't have the money; is that what your telling me right now? That's what it sounds like.

A Well, we did not have the money at the time this was done.

Q You said that he couldn't start because you didn't have the money; is that correct?

A That's correct.

Q Okay. And he started before, in fact, you did get the money, didn't he?

A That's correct.

Q He made a good faith effort to make good on this contract even knowing that you didn't have the money to pay him at that time; is that true?

A That's correct.

(Record, page 66 line 7).

Although Defendants admitted good faith performance by Plaintiff's Decedent, Defendants could not demonstrate good faith on their own behalves. The following testimony was elicited from Defendant, Regan Lutzko, on cross-examination:

Q And part of the terms of that contract were that you pay 50 percent upon delivery of materials, correct?

A Correct.

Q Okay. And can we agree that there was a delivery of materials for the job?

A Yes.

Q Can we also agree that you did not pay him anything?

A Yes.

(Record page 209 line 7). Joyce Gonter, South Side Construction's bookkeeper, testified that the grand total cost of material and labor was twenty-two thousand eight hundred forty-four dollars and eleven cents ($22,844.11). (Record, p. 26, l. 21). That amount was paid in full by South Side Construction. (Record, p. 26,

l. 24). Ms. Gonter requested Defendant-Appellants to pay at least one-half of this total. However, Defendants-Appellant *never paid anything;* according to Joyce Gonter:

Q You were requesting how much on the accounts receivable?
A We were asking for at least half.

Q Okay. Why half?
A To at least cover the amount of material and labor.

Q Okay. Did Regan Lutzko or Crown Motel, in fact, pay one-half?
A No, they did not.

Q But you had already expended funds to pay for these materials?
A Correct.

Q These materials were already paid for?
A Yes.

Q Was labor paid for?
A Yes.

Q Okay. Regan did not pay half of anything?
A No.

Q Did Crown pay half of anything?
A No.

Q Did anybody pay half of anything?
A No.

Q In December of 1985, did you receive any money at all for the Crown Motel Construction?
A No.

Q As to this very day, did you receive any money from the Crown Motel project?
A No.

(Record, page 10 line 3).

CONCLUSION

For the foregoing reasons, Appellant, JANET LIERENZ, respectfully requests this Honorable Court accept the instant case for review.

/S/_____
J. Michael Goldberg
Peggy E. Goldner

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Supreme Court Jurisdiction* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 25th day of April, 1994.

/S/_____
J. Michael Goldberg

APPENDIX

Notice of Appeal to the Supreme Court
Assignments of Error Filed in the Court of Appeals
Opinion of the Court of Appeals
Journal Entry of the Court of Appeals
Journal Entry from the Court of Common Pleas
R.C. § 1.11
R.C. § 1343.03(A)
R.C. § 2309.59
Civ. R. 17(A)

IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix, Appellant,	
vs.	SUP. CT. NO. 94-510
MAX BOWEN, *et al.*, Appellees.	On Appeal from the Erie County Court of Appeals, Sixth Appellate District Case No. E-92-71

APPELLANT'S MOTION FOR RECONSIDERATION RE: SECOND MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

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IN THE SUPREME COURT OF OHIO

JANET LIERENZ, Executrix, Appellant,	}	SUP. CT. NO. 94-510
vs.	}	On Appeal from the Erie County Court of Appeals, Sixth Appellate District Case No. E-92-71
MAX BOWEN, *et al.*, Appellees.	}	

APPELLANT'S MOTION FOR RECONSIDERATION RE: SECOND MOTION FOR EXTENSION OF TIME TO FILE MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes the Appellant, JANET LIERENZ, EXECUTRIX OF THE ESTATE OF KARL LIERENZ, by and through the undersigned counsel, and respectfully moves this Honorable Court reconsider its ruling denying Appellant's second motion for extension of time to file her memorandum in support of jurisdiction.

Appellant's *Memorandum* originally was due on 7 March 1994. By that date, undersigned counsel had been involved with extensive trial preparation of the case styled Apel v. Katz, Cuyahoga C.P. 174255, as well as the trial, itself, which lasted four days. From that time until March 7th, said counsel was faced with the preparation and taking or defending of five (5) full days of depositions on three (3) different cases. Therefore, on March 7th, Appellant filed a timely motion for extension of time, requesting forty-five (45) days to file the *Memorandum*. The forty-five days would have

ended on Thursday, 21 April 1994 and presumably would have given the undersigned counsel sufficient time to complete and file the *Memorandum*. Said counsel requested forty-five (45) days because several days would be consumed either by scheduled depositions, arbitrations, preparation for trial of at least two cases, in addition to counsel's regular daily law practice. The Court granted Appellant's motion but ordered the *Memorandum* filed on April 15th instead of the 21st.

By April 15th, the undersigned counsel had substantially completed the *Memorandum* but could not have it prepared for filing by that date. Although the undersigned had gone to Columbus and Cincinnati on an urgent legal matter from April 12th to April 14th, he believed that the *Memorandum* could be completed by April 14th and forwarded to this Honorable Court by Federal Express by April 15th. Unfortunately, the undersigned was not able completely to finish the *Memorandum*; this problem was compounded by the undersigned's problems with a certain copier machine, which on April 13th had been specially ordered from OBM (Ohio Business Machines) for April 14th. Therefore, on April 14th, counsel for Appellant filed by facsimile a second motion for extension of time, requesting fourteen (14) days to complete and file the *Memorandum*. Fourteen days was requested because said counsel was scheduled to be in Louisville, Kentucky from Tuesday 19 April through Sunday 24 April, on business.

On Friday 22 April, the undersigned called his office from Kentucky and learned that the Court had denied Appellant's second motion for an extension. On

Monday April 25th, counsel set aside the entire day to complete for filing the *Memorandum*. In fact, the *Memorandum* and a motion for leave to file instanter was sent to the Court via Federal Express and was received for filing the next day, April 26th.

The undersigned counsel understands the importance of completing the *Memorandum* for timely filing. Maintaining a law practice, however, requires flexibility in handling unexpected matters which arise while handling scheduled events. The undersigned counsel is a sole practitioner who started his own law practice three years ago (upon obtaining his license to practice law) and has no support staff to whom tasks may be delegated. The undersigned respectfully asks this Honorable Court to recognize the time which such a practitioner must devote daily to keep up with the demands of his clients and the practice itself.

This Honorable Court has held: "Only a flagrant, substantial disregard for the local rules of a court of appeals can justify a dismissal on procedural grounds." DeHart v. Aetna Life Insurance Co. (1982), 69 Ohio St. 2d 210, Syllabus. In DeHart, the Court stated:

> * * * [W]e hasten to emphasize -- indeed re-emphasize -- that it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits. [citation omitted] Judicial discretion must be carefully --and cautiously -- exercised before this court will uphold an outright dismissal of a case on purely procedural grounds.

Id. at 192.

The instant action was tried to a jury, which after four days of trial, returned a unanimous verdict in favor of the Appellant herein. The court of appeals[2] disregarded the jury's verdict and ordered the action dismissed. By doing so, the appellate court violated Appellant's right to due process under both U.S. and Ohio constitutions.

Appellant believes that, on review, this Court will recognize the important constitutional issues presented. If the appellate court's decision is destined to stand, then Appellant respectfully asserts that it should stand on its merits – not because Appellant's attorney filed the *Memorandum* eleven days late. Appellant asks the Court to consider that the second motion for extension was filed within rule; that April 26th was the absolute earliest date the undersigned could file the *Memorandum*, having learned while out of the State that the motion for extension had been denied; and that the Appellee will have suffered no prejudice whatsoever if the Court considers the April 26th filing sufficient.

Respectfully submitted,

J. Michael Goldberg
(0046685)
75 Public Square
Suite 1020
Cleveland, Ohio 44113
(216) 621-1375
Attorney for Appellant

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[2] Judge Melvin Resnick dissenting

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion For Reconsideration* has been sent by ordinary U.S. Mail to, JOHN F. KIRWAN, ESQ., 189 E. Market Street, Sandusky, Ohio 44870 on this 29th day of April 1994.

/s/ J. Michael Goldberg

Janet Lierenz, Executrix, Appellant,	}	1994 TERM
	}	To wit: June 8, 1994
v.	}	
	}	Case No. 94-510
Max Bowen, et al., Appellees.	}	E N T R Y

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Erie County to certify its record and as a claimed appeal as of right from said court. Upon consideration of appellant's motion for leave to file memorandum in support of jurisdiction instanter and appellant's motion to reconsider this Court's denial of extension of time (filed before June 1, 1994),

IT IS ORDERED by the Court that the motion for leave to file memorandum in support of jurisdiction instanter be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that the motion to reconsider this Court's denial of extension to [sic] time be, and the same hereby, denied.

Accordingly, it is further ordered by the Court that this cause be, and the same is hereby, dismissed.

COSTS:

Motion Fee, $40.00, paid by J. Michael Goldberg. (Court of Appeals No. E9271)

/s/ THOMAS J. MOYER, C.J.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.